Supreme Court, U.S.
FILED
JUL 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-289

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DONALD E. CANNON, Petitioner,

v.

LEWANNE ROWEN, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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June 27, 1988

QUESTION PRESENTED

1. Is an order denying a motion to vacate made pursuant to Federal Rules of Civil Procedure, Rule 60(b) appealable as a final judgment under 28 U.S.C. section 1291, even though the order was issued in the same decree as a remand order that is not reviewable according to 28 U.S.C. section 1447(d)?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Donald E. Cannon and the respondents Lewanne Rowen, Theodore Rowen, and Paul J. Fry. Although named as a cross-defendant in the trial court, Paul J. Fry was never served with summons and complaint and never appeared in the action.

The respondents before this Court are Lewanne Rowen and Theodore Rowen.

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OCTOBER TERM, 1988

DONALD E. CANNON, Petitioner,

v.

LEWANNE ROWEN, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Donald E. Cannon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 4, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been

reported. It is reprinted in the appendix hereto, page 1a, infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1446, the petitioner removed this case to the Eastern District of California on or about November 13, 1986.

The Eastern District denied petitioner's motion to vacate brought pursuant to Federal Rules of Civil Procedure, Rule 60(b) and in the same decree granted respondent's counter-motion to remand the case to State Court. See p. 3a, infra.

Petitioner sought review of the Eastern District's ruling on the motion to vacate and filed an appeal with the Ninth Circuit pursuant to 28 U.S.C. § 1291. See p. 9a, infra. On April 4, 1988, the Ninth Circuit entered an order, without opinion, dismissing petitioner's appeal on the grounds that the court lacked jurisdiction.

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See page 1a, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291. Final decisions of district courts

The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Vigin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in § 1292(c) and (d) and 1295 of this title.

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28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State Court, the District Court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State Court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State Court or may cause the same to be brought before it by writ of certiorari issued to such State Court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the District Court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State Court. The

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State Court may thereupon proceed with such case.

(d) An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State Court from which it was removed pursuant to Section 1443 of this title sh' be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

This case originated in the State Court as a chiropractic malpractice action. Petitioner, defendant in the State Court action, invoked the jurisdiction of the Federal Court pursuant to 28 U.S.C. § 1446. He filed his petition for removal with the Eastern District of California on November 13, 1988, and filed a copy of the petition with the State Court and served it on the adverse parties.

Over two months after filing and service of petitioner's petition for removal, the State Court proceeded to

conduct a jury trial and enter judgment against petitioner on January 21, 1988. Petitioner believed that the State Court was without jurisdiction and did not appear to defend his interests at the trial. A judgment in the amount of 1.7 million dollars was entered against petitioner in the State court action.

On January 30, 1987, petitioner filed a motion in the Eastern District to vacate the State Court judgment pursuant to Federal Rules of Civil Procedure, Rule 60(b).

On February 13, 1987, respondents' filed their counter-motion to remand the case to State Court.

Both motions were considered by the Eastern District on February 19, 1987. In the decree relating to both motions, the court ruled on each motion individually, first denying petitioner's motion, then granting respondents' motion. See p. 3a, infra.

Petitioner then appealed from the Eastern District's ruling denying his motion to vacate. Petitioner invoked the Ninth Circuit's jurisdiction under 28 U.S.C. § 1291 to review final decisions of district courts. See p. 9a, infra.

The Ninth Circuit dismissed petitioner's appeal without opinion, stating in the order that the court lacked jurisdiction and citing 28 U.S.C. § 1447(d). See p. 1a, infra.

The Ninth Circuit apparently concluded that petitioner was seeking review of an order of remand, which is expressly prohibited by 28 U.S.C. § 1447(d). Petitioner was not in fact seeking a review of a remand order; Petitioner was seeking review of the order denying his motion to vacate the State Court judgment, which order was embodied in the same decree as the remand order. However, the order on the motion to vacate is appealable as a

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final decision of a District Court under 28 U.S.C. § 1291.

After remand, petitioner sought appellate review of the proceedings in State Court. On April 29, 1988, the California Supreme Court denied his petition for hearing. Petitioner anticipates duly filing a writ of certiorari requesting review of the State Court proceedings.

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's decision conflicts with decisions of this Court.

The Ninth Circuit has failed to follow the authority of this Court by not recognizing that review of an order made prior to remand is not precluded because that order appears in the same decree as the order of remand. The Ninth Circuit's decision deserves this Court's attention because its effect is to shield an otherwise appealable order from review in

direct contravention of 28 U.S.C. § 1291.

An order entered prior to a remand order is appealable even though the remand order is not. (Waco v. U.S. Fidelty & G Company 239 U.S. 140, 143 (1934).) In Waco, supra, the court entered a single decree embodying three separate orders. First, the court denied a motion to remand the entire action to the State court. Second, the court granted a motion to dismiss a third party defendant, which destroyed diversity. Third, the remaining cause was remanded to State Court.

The appellant in Waco appealed from the portion of the decree dismissing the third party defendant. The Court of Appeals dismissed the appeal, holding that since remand orders are not appealable, the Court of Appeals had no jurisdiction. The United States Supreme Court reversed the order dismissing the appeal, saying that:

> "True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal

> preceeded that of remand and was made by the District Court while it had control of the cause. Indisputably, this order is the subject of an appeal; and if not reversed or set aside, is conclusive upon the petitioner." (Waco, supra at 143.)

The holding from Waco was directly applicable to petitioner's appeal to the Ninth Circuit in this case. Like the order appealed from in Waco, the order denying petitioner's motion to vacate was issued in the same decree as a remand order, and in logic and in fact, the order denying the motion to vacate preceeded that of remand. This is evidenced by the sequence in which the rulings were issued in the decree, and also by logic since the District Court could not have ruled on any motions subsequent to remanding the case to State Court inasmuch as the remand order divested the District Court of jurisdiction.

Therefore, the order denying petitioner's motion to vacate is reviewable even though it was issued in the same

decree as a remand order, and the Ninth Circuit should not have dismissed petitioner's appeal for lack of jurisdiction.

II

The Ninth Circuit's decision to dismiss petitioner's appeal raises important and unresolved problems.

The effect of denying an appeal of an order issued in the same decree as a remand order is to immunize the prior order from review. Where the prior order would otherwise be appealable, the effect is to deny an appeal authorized by statute, and this clearly violates congressional intent. The Waco decision, referred to above, clearly provided that review of an appealable order would not be precluded simply because that order was embodied in a decree containing a remand order.

Lower courts need guidance from this Court as to the effect of a remand order on orders entered prior to remand which may be

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contained in the same document as the remand order.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. If the petitioner is correct in urging that the Ninth Circuit had jurisdiction to hear the appeal of the District Court's order denying petitioner's motion to vacate, then the matter should be remanded to the District Court for appropriate disposition.

Respectfully submitted,

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June 27, 1988

APPENDIX

1. Order of the United States Court of Appeals for the Ninth Circuit. 1a

2. Order of the United States District Court For the Eastern District of California 3a

3. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit 11a

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD E. CANNON,	)	No. 87-1869
	)	
Petitioner,	)	DC# CV-86-1351-MLS
	)	
v.	)	Eastern California
	)	
LEWANNE ROWEN, et al.,	)	(Sacramento)
	)	
Respondents-Appellees.	)	ORDER
	)	

Before: CANBY, BEEZER and KOZINKI, Circuit Judges

The appeal is dismissed for lack of jurisdiction. See 28 U.S.C. §1447(d).

MoCal 3/31/88

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JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD E. CANNON, Petitioner, vs. LEWANNE ROWEN, Respondents-Appellees.	)	CA NO. 87-1869 No. DC NO. CV-86-1351-MLS

APPEAL from the United States District Court for the Eastern District of California (Sacramento).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this Cause be, and hereby is dismissed.

Filed and entered April 4, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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DONALD E. CANNON,	)	
	)	
Petitioner,	)	CIVIL NO.
	)	S-86-1351 MLS
vs.	)	
	)	
LEWANNE and THEODORE ROWEN; PAUL J FRY,	)	
	)	
Respondents.	)	
	)	

O R D E R

On February 19, 1987, this case came before the court on petitioner's motion to set aside a state court judgment and respondents' motion to remand nunc pro tunc. The issue presented is whether the removal process was completed, thus divesting the state court of jurisdiction.

I. BACKGROUND

This case originated in the state court as a medical malpractice action filed in 1982. From what the court can discern,

one of the plaintiffs in this action, respondent Lewanne Rowen, was a patient of petitioner, a chiropractor. She alleged petitioner negligently treated her, proximately causing injuries and damage. An amended complaint was filed January 10, 1985 and petitioner filed an answer February 13, 1985. On November 13, 1986, petitioner filed a petition for removal and posted a bond in this court. A proof of service attached to the removal petition indicates a copy of the petition was sent to respondents and the state court.

A jury trial commenced in state court on January 12, 1987. Before proceeding to trial, however, the state court judge purported to rule on the validity of the removal. He found that the removal was defective, under 28 U.S.C. § 1446,[1/] in two respects: first, that the petition was not filed within 30 days after service of the

1/ All further statutory references will be to Title 28 of the United States Code.

complaint; and second, that it did not appear that a bond was filed. (Exhibit to document 12, Declaration of Van Longyear, Reporter's Transcript at 4-5.) The case thus proceeded to trial in petitioner's absence and the jury awarded respondents approximately $1.7 million.

Petitioner moves the court to set aside the state court judgment contending (1) That exclusive jurisdiction was vested in this court on the filing and notice of the petition for removal; and (2) That the court should set aside the state court judgment pursuant to Federal Rule of Civil Procedure 60(b)(4) because the state court lacked jurisdiction. Respondent moves the court to remand the matter to state court nunc pro tunc contending that, because the parties were not diverse when the complaint was filed, because the petition was untimely and because there was no notice of the posting of bond, no effective removal ever took place.

II. ANALYSIS

In Berberian v. Gibney, 514 F.2d 790 (1795), the First Circuit noted its agreement with Professor Moore "that the jurisdiction of the federal court attaches as soon as the petition for removal is filed with it, and that both state and federal courts have jurisdiction until the process of removal is complete. 1A Moore ¶0.168[3.--8], at 509-511." Id. at 793. When proper notice is served on the adverse parties and the state court, the removal process is complete and the district court has exclusive jurisdiction over the case. Id. at 792, citing Georgia v. Rachel, 384 U.S. 780, 797 n.27, 86 S. Ct. 783, 16 L.Ed.2d 925 (1966). The requirements for notice are set forth in section 1446(e):

> Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall

> proceed no further unless and until the case is remanded.

It is undisputed that petitioner never served notice of the bond on the adverse parties. Neither party has cited any case, nor is the court aware of any case, holding that such notice is or is not necessary to complete the removal process. Petitioner contends that

> the word "thereof" should be read to only modify the petition, as evidenced by the fact that only a copy of the petition need be filed by defendant with the clerk of the State court. No point would be served by construing the statute to mean that a notice of the bond must be given the adverse parties but not the State court.

The court disagrees. First, a reading of the plain language of the statute indicates that written notice of both the petition and the bond must be given to the adverse parties. Second, the bond is for the benefit of the adverse parties in order to pay such parties' costs should the removal be found improper. § 1446(d). The state

court judge looked specifically to this statute and correctly determined that respondents were not given notice that a bond had been posted. Thus, a precondition to the divesting of state court jurisdiction as set forth in section 1446(e) was not met and the state court had concurrent jurisdiction to proceed with the trial.

In coming to this conclusion, the court does not endorse the procedure followed in this case. The state court judge purported to hold the removal defective in part because the petition was filed more than 30 days after the service of the complaint. This time limit appears to involve a procedural matter only; however, because the limit applies only when the case as initially pleaded is removable, complex issues of substantive federal law may arise as to whether the case was removable at the time of the initial pleading. That is an issue

properly addressed to the federal court on a motion to remand. It is for the federal court to determine the merits of the removal and whether the removal itself was proper. As to the notice of removal -- the act which completes the removal process and thereby divests the state court of jurisdiction -- the state court must look to the operative statute, section 1446(e). In this case the state court did so and its finding that notice of the bond was not given to the adverse parties was correct. The state court had concurrent jurisdiction over this case and this court will not set aside its judgment.

This court finds that if the case was removable at all, it was removable when first filed in 1982; thus, the petition for removal was untimely and the case must be remanded pursuant to section 1447(c). While the time limit of section 1446(b) is not jurisdictional, it is mandatory, Fristoe v. Reynolds Metals Co., 615 F.2d

1209, 1212 (9th Cir. 1980). Failure to abide by the statutory time requirement is the sort of defect which the district court is entitled to consider and which may result in a finding of improvident removal within the meaning of section 1447(c). London v. United States Fir Ins. Co., 531 F.2d 257, 260 (5th Cir. 1976).

Respondents have not cited any authority supporting their contention that the remand order should be made effective nunc pro tunc, however, the court sees no reason to do so.

III. CONCLUSION

Accordingly, IT IS ORDERED:

1. That petitioner's motion to set aside the state court judgment is DENIED;

2. That respondents' motion to remand is GRANTED; and

3. That respondents' request for an award of costs is DENIED without prejudice.

DATED: March 4, 1987

UNITED STATES DISTRICT JUDGE

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ATTORNEYS FOR DONALD E. CANNON

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DONALD E. CANNON, Petitioner, v. LEWANNE AND THEODORE ROWEN; PAUL J. FRY, Respondents.	)	CIV. S-86-1351 MLS NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Donald E. Cannon, petitioner above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the portion of the order of the District Court for the Eastern District of California, dated March 4, 1987, wherein the District Court denied the petitioner's motion made

pursuant to Federal Rules of Civil Procedure, Rule 60(b)(4) to set aside the state court judgment.

Petitioner does not appeal from the portions of the order wherein respondents' motion to remand is granted and wherein the respondents' request for an award of costs is denied without prejudice.

DATED: March 30, 1987

LONGYEAR & HAYES

By_____
Van Longyear
Attorneys for Petitioner